IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5398 OF 2003

Shri Anandrao Pilappa Patil,)
age about 55 years, Occupation:)
Advocate & Agriculture r/o.)
Mandrul-Kole, Tal. Patan, Dist.)
Satara.) ... Petitioner

Versus

1. Mr. Madhukar Shankarrao Patil)
age about 45 years,Occupation)
Agriculture & Business, r/o.)
Mandrul-Kole, Tal. Patan,)
Dist. Satara.)

2. Mr. Vasant Tanaji Kadam,)
age about 35 years, R/at,)
Salave, Tal. Patan, Dist.)
Satara.)

3. Returning Officer,)
Zilla Parishad/Panchayat)
Samiti, Tal. Patan, Dist.)
Satara.)

4. The Collector,)
Satara.) ... Respondents

Mr. Vijay Patil with Mr. Dilip Bodake for the petitioner.

Mr. Kumbhakoni with Mr. S.S. Patwardhan for respondents.

CORAM: SMT. RANJANA DESAI, J.

DATED: 15TH MARCH, 2005.

ORAL JUDGMENT:-

1. In this petition, the petitioner has challenged the judgment and order dated 8/7/2003 passed by the District Court, Satara Division at Karad, in Election Petition No.5 of 2002, dismissing his election petition.

2. The petitioner and respondents 1 and 2 were contesting candidates for election of Panchayat Samiti of 28 Sanbur electoral college of Patan. Respondent 3 is the Returning Officer, Satara. Respondent 4 is the Collector, Satara, who had conducted the election. The voting took place on 17/2/2002. After counting of votes, on 18/2/2002, the result was declared and respondent 1 was declared elected by 186 votes. The petitioner challenged the said election in Election Petition No.5 of 2002.

3. The petitioner in Election Petition No.9 of 2002 challenged the election of Dhebewadi 27 electoral college. He and respondent 1 therein were the contesting candidates from Dhebewadi 27 electoral college. Respondent 1 therein was declared elected by 1568 votes. Since both the petitions arose out of similar facts and contained similar grounds, the District Court disposed them of by a common judgment. That judgment is impugned in this petition only by the petitioner in Election Petition No.5 of 2002 and, therefore, it is necessary to refer to only his case and submissions.

4. According to the petitioner, he is the resident of village Mandrul Kole. Dhebewadi is one electoral division (Gat) for Zilla Parishad election. For the purpose of Panchayat Samiti, it is divided into two electoral colleges (Gan.). Sanbur 28 and Dhebewadi 27 were the two electoral collages of Dhebewadi. On

18/11/2001, the list of electoral colleges was declared. The date of raising objections was declared as 7/12/2001. According to the petitioner, on 24/12/2001, there was final publication in respect of division of electoral colleges and electoral divisions in the block of Patan Panchayat Samiti. One member had to be elected from Sanbur electoral college. According to the petitioner, the total voters for Sanbur electoral college were 13,517. From Dhebewadi 27 electoral college also one candidate had to be elected and total voters from that electoral college were 13,543. Three polling stations were declared for village Mandrul Kole. Out of three polling centres, polling centres 241 and 242 were included in Sanbur 28 electoral college and third polling centre 246 was included in Dhebewadi electoral college 27. The voters of polling centre 246 were required to caste their votes from electoral college 27. They were not included in Sanbur electoral college 28. This situation was in existence till 24/12/2001 when the final list of electoral colleges was published.

5. According to the petitioner, one day prior to the election, polling centre 246 was included in Sanbur electoral college 28. After getting to know about this, the petitioner raised objections and brought this fact to the notice of the concerned officers. The petitioner was informed that the change is made by superior officers. It is the case of the petitioner that 733 voters of 246 Dhebewadi electoral college did not caste their votes

from electoral college 27. On the contrary, they caste their votes from electoral college 28 though they had no right to caste their votes from electoral college 28. Therefore, that election is illegal. Because the said voters did not caste their votes from electoral college 27, that election is also illegal. The net result of this is that the members elected from electoral college 27 and 28 are illegally elected.

6. According to the petitioner, after the declaration of results, he came to know that one person by name Sambhaji Ganpati Lohar, resident of Mandrul Kole, Taluka Patan had submitted an application to the Additional Collector, Satara i.e. Election Returning Officer of Zilla Parishad and Panchayat Samiti, Satara after 7/12/2001, requesting him to include polling centre 246 Dhebewadi from electoral college 27 in electoral college 28. According to the petitioner, this letter itself makes it clear that till the previous day of the polling, polling centre 246 was not included in Sanbur electoral college. The election process is thus vitiated on account of illegalities and irregularities and the corrupt practices adopted by respondent 1 and, therefore, the election to electoral college Sanbur deserves to be set aside.

7. The petitioner has made two fold prayers. The first prayer is that the votes of voters who caste their votes in polling centre 246 Dhebewadi be separated and the rest of the votes be recounted and if that is not feasible,

the election be set aside and fresh election of the said electoral college be ordered. He has also prayed that the voters of 246 Dhebewadi electoral college be restrained from casting their votes in favour of the candidates who are contesting election from 28 Sanbur electoral college.

8. Respondent 1 filed his written statement. According to him, the date 24/12/2001 was not the date of final publication as required under section 58(1A) of the Maharashtra Zilla Parishads and Panchayat Samitis Act 1961 (for short, "the said Act"). It was the date on which, as per election programme, information mentioned at serial no.9 was to be published. It was determined by the Presiding Officer and not by the Election Commission. Some powers are delegated under section 9-A of the said Act to the District Collector. Under the Maharashtra Zilla Parishads and Panchayat Samitis (Electoral Colleges and Conduct of Election) Rules 1962 (for short, "the said Rules"), the Returning Officer is appointed by the District Collector. He is the District Collectors' assistant. Final date of publication under section 58(1A) of the said Act is to be determined by the Election Commission and not by the Returning Officer. He is not empowered to take final decision. In the election programme, the Election Commission had directed that the proposal in respect of Prarup Prabhag Rachana be prepared and sent to the Election Commission. After receipt of objections, final decision was to be taken by the

Election Commission and not by the Returning Officer because he is not empowered to take such a decision.

9. According to respondent 3, three polling centers were sanctioned for village Mandrul Kole. While publishing the voters list, polling centre 246 was shown as being the polling centre for Dhebewadi electoral college 27 by mistake. In fact, the voters of Dhebewadi 246 are residents of village Mandrul Kole and are part and parcel of its Grampanchayat. At the time of formation of electoral colleges, map was prepared and sent to the Election Commission. The entire Mandrul Kole village was shown in Sanbur 28 electoral college. According to respondent 1, the Sarpanch of village Mandrul Kole submitted an application supported by Grampanchayat resolution to the Returning Officer for change in the polling centre. It was forwarded to the District Collector, Satara. The District Collector, Satara, took the distance and inconvenience of voters into consideration, made the necessary change in the polling center and published it on 8/2/2002. This change was effected more than 7 days prior to polling and all concerned were aware about it. It was a mistake which could be rectified under Rules 7 and 9 of the said Rules. Respondent 1 further contended that polling center 246 has no concern with Dhebewadi Grampanchayat. Voters of polling centre 246 have legally caste their votes.

10. Respondent 1 further contended that the voters list

is prepared for the assembly election. It is also used for Panchayat Samiti and Zilla Parishad elections. At the time of assembly election, electoral division and colleges are not divided. They stand as they are. For the purpose of Panchayat Samiti election, while publishing the voters' list the names of voters of polling centre 246 were included in electoral college 27 and not in electoral college 28. This mistake was rectified under rule 7. Respondent 1 further contended that the petitioner's remedy is to file election dispute under section 58 of the said Act and not by way of the instant petition.

11. Respondent 1 urged that no election petition is filed in connection with Dhebewadi electoral division which is finally declared. If the voting of polling centre 246 is declared void, it would amount to withdrawing the rights of the said voters. That cannot be done. If the alternative prayer of the petitioner of separating the votes, is granted that would be against the principle of secrecy of voting. On all these counts, respondent 1 urged that the petition be dismissed.

12. Respondent 2 filed a pursis and contended that he has accepted the election result declared by respondent 3. He urged that the petition be dismissed.

13. Respondent 3 filed his written statement. He contended that Dhebewadi is one electoral division (gat)

and for the purpose of Panchayat Samiti, it is divided into two electoral colleges (gan). On 24/12/2001, there was final publication in respect of division of electoral colleges and electoral divisions in the Patan Panchayat Samiti Block. Accordingly, division stating the area, number of total seats, and reservation, etc. was published. It was a declaration of electoral colleges. It mentioned the names of villages which shall come within the electoral colleges. In that declaration, village Mandrul Kole, Khurd and village Mandrul Kole Bk were included in Sanbur electoral college. The said declaration was made final on 24/12/2001. Request for change of polling center was received from Grampanchayat Mandrul Kole. It was found to be genuine and, hence, change was effected and declared more than 7 days prior to the date of polling as per the said Rules. Respondent 3 denied that he acted under political influence.

14. Respondent 4, the District Collector, Satara adopted the written statement of respondent 3.

15. The petitioner examined himself. The petitioner also examined Ms. Vidyut Ashok Varkhedkar, the Tahsildar of Patan and one Baburao Kondiba Shinde. Respondent 1 examined one Somnath Pandit Jangam. Arvind Baba Koli, who was the Returning Officer for Zilla Parishad and Panchayat Samiti elections was also examined. Respondents 2 to 4 did not lead any oral evidence. The

petitioner, respondent 1 and respondents 2 to 4 produced certain documents.

16. The trial court dismissed the petition holding, inter alia, that the petitioner had failed to prove that electoral colleges 27 and 28 of electoral division 14 Dhebewadi were finally declared on 24/12/2001 having votes 13,543 and 13,517 respectively. It was further held that the petitioner had failed to prove that the order of the Returning Officer in respect of the polling station 246 Dhebewadi dated 8/2/2002 is illegal. It was further held that the petitioner had failed to prove that polling centre 246 was illegally included in electoral college 28 from electoral college 27 after the final declaration. The trial court held that the allegation regarding corrupt practice was not proved. The said judgment is challenged before me.

17. I have heard Mr. Patil, the learned counsel appearing for the petitioner and Mr. Kumbhakoni the learned counsel appearing for the respondents, at great length. With the assistance of the learned counsel, I have perused the record.

18. Mr. Patil, the learned counsel for the petitioner took me through the relevant provisions of the said Act and the said Rules. He contended that this is a case of flagrant violation of basic legal principles underlying

and governing elections. He submitted that the trial court has misinterpreted and misconstrued the relevant provisions of the said Act and the said Rules causing grave injustice to the petitioner. He pointed out that section 9 of the said Act provides for constitution of Zilla Parishads. Section 12 makes provision for division of districts into electoral divisions and under section 58, each electoral division in the block, is divided into two electoral colleges. Section 57 states that every Panchayat Samiti shall consist of members elected by direct election from each electoral college. He submitted that 14 Dhebewadi electoral college consists of 2 electoral colleges namely Dhebewadi 27 and Sanbur 28. From Dhebewadi 27, one member was to be elected. From Sanbur 28, one member was to be elected. There are 13,543 voters in Dhebewadi 27 and there are 13,517 voters in Sanbur 28. On 18/11/2001, the list of electoral colleges was declared. Objections were to be raised upto 7/12/2001. On 24/12/2001 final publication in respect of electoral divisions and electoral colleges was made. The elections were to be held on 17/2/2002. The petitioner was to contest from Sanbur 28. Mr. Patil contended that one day prior to the election, polling centre 246 which was included in 27 Dhebewadi was included in Sanbur 28. Centre 246 had 733 voters. They were to caste their votes from electoral college Dhebewadi 27. But because of this last minute change they had to caste their votes from the petitioner's electoral college Sanbur 28. Due to short notice, the petitioner could not canvass amongst

the said 733 voters and, therefore, they voted in favour of respondent 1.

19. Mr. Patil further contended that there is no legal basis for the contention that the constituency has to be prepared village-wise and this impression sought to be created by the defendants is wrong. He drew my attention to the list of electoral centres 2002 of Dhebewadi electoral college of Patan electoral division. He submitted that at sr.no.14/6, Dhebewadi 246 polling centre is mentioned and 733 votes are shown against it. In 28 Sanbur electoral college, at sr.no.14/38, electoral centre 241 having 588 voters is shown and at sr. no.14/39 polling centre 242 is shown and 819 voters are shown against it. He submitted that Dhebewadi polling centre was removed from sr.no.14/6 from 27 Dhebewadi electoral college and added at the end of polling centres of 28 Sanbur electoral college. Polling centre 244 was shifted to sr.no.14/41 and at sr.no.14/42 Dhebewadi 246 was shown. This illegal last minute change has caused great injustice to the petitioner. These facts have been admitted by PW-2 Koli. He has also admitted that there is no village by name Mandrul Kole Budruk. Mr. Patil contended that this is not a case of merely changing the place of voting. He submitted that polling station 246 having 733 voters was shifted from 27 Dhebewadi electoral college to 28 Sanbur electoral college resulting in these 733 voters illegally casting their votes in 28 Sanbur electoral college.

20. Mr. Patil pointed out that DW-3 Mr. Shinde Resident Naib Tahsildar has admitted that he was directed to bring the original record but the Tahsildar's office informed him that the original record was not traceable.

This smacks of corrupt practice.

21. Mr. Patil drew my attention to the register of training programme and contended that illegally relevant entries were cancelled. There was scoring in training musters which is admitted by Shri Koli. This scoring indicated that in 28 Sanbur, one polling centre was increased. He further submitted that respondent 1 has not entered in the witness box. He has not subjected himself to cross-examination and, hence, adverse inference needs to be drawn against him. In this connection, he relied on the judgment of the Supreme Court in **Iswar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and another, (1999) 3 SCC 457**. He also submitted that there are several admissions in the evidence of Shri Koli which support the petitioner's case. The learned counsel relied on the judgment of the Supreme Court in **State of Madhya Pradesh and others v. Devilal AIR 1986 SC 434** and contended that once notification delimiting constituencies is issued subsequent modification or alteration of constituencies

after the election process starts, is not competent.

22. Lastly Mr. Patil contended that this is a case

where either the votes of the voters who caste their votes in 246 Dhebewadi will have to be separated and rest of the votes will have to be recounted or the election will have to be set aside and fresh election will have to be ordered.

23. Mr. Kumbhakoni, on the other hand, submitted that there are no illegalities committed by the respondents. He submitted that corrupt practice is not even clearly alleged. It is also not proved. He submitted that there was no change in the electoral colleges. All that was done was shifting of polling station 246 to 28 Sanbur as per rule 9 of the said Rules. He submitted that only the error was rectified and the rectification was done not less than 7 days before the date of poll as required by rule 9. Mr. Kumbhakoni contended that it is true that scoring was done in the register but, that was a consequence of the rectification of mistake. It was done openly and no malpractice is involved in the said scoring. Mr. Kumbhakoni contended that till the results were declared, the petitioner did not register any protest. Though it is true that once election process starts, the court does not interfere with it, the fact that the petitioner did not register protest with any authorities would indicate that the petitioner does not have any genuine grievance. He wanted to take chance. He waited till the results were declared and, because the results were adverse to him, he filed the instant petition by taking up frivolous grounds. Relying on the

judgment of the Supreme Court in **Shri Beli Ram v. Shri Nand Kumar and Others, (1977) 2 SCC 109**, he submitted that the petitioner has not been able to prove how because of the alleged illegalities, the result of election, so far as he is concerned, is materially affected. Mr. Kumbhakoni further contended that the petitioner in Election Petition No.9 of 2002 has not challenged the trial court's judgment. The election of 27 Dhebewadi is, therefore, valid. If the petitioner's prayers are granted, that will invalidate the election of 27 Dhebewadi electoral college. Such a result would affect the voting rights of the voters of that electoral college. Mr. Kumbhakoni submitted that in the circumstances, the petition deserves to be dismissed.

24. Before touching the merits of the case, it is necessary to have a look at the relevant provisions of the said Act and the said Rules. Section 9 of the said Act provides for constitution of Zilla Parishads. Section 12 provides for division of district into electoral divisions. So far as it is relevant, it reads thus:

> "12. The State Election Commission shall, for the purposes of election of Councillors divide each District, into electoral divisions (the territorial extent of any such division not being outside the limits of the same Block), each returning one

Councillor and there shall be a separate election for each electoral division."

25. Section 13 provides for "The list of voters". So far as it is relevant, section 13 reads thus.

"13. (1) The electoral roll of the Maharashtra Legislative Assembly [excluding the last part thereof as is referred to in sub-rule (2) of rule 5 of the Registration of Electors Rules, 1960 made under the Representation of the People Act, 1950] prepared under the provisions of the Representation of the People Act, 1950, and in force on such day as the [State Election Commission] may by general or special order notify in this behalf for such part of the constituency of the Assembly as is included in an electoral division, shall be the list of voters, for such electoral division."

26. Section 57 provides for "Constitution of Panchayat Samitis". So far as, it is relevant, it reads thus:

"57. (1) Every Panchayat Samiti shall consist of members elected by direct election one each from each electoral college in accordance with the provisions

contained in section 58 and the rules in that behalf.

Provided that, the ratio between the population of the territorial area of a Panchayat Samiti and the number of seats in such Panchayat Samiti to be filled in by election shall, as far as practicable, be the same throughout the State."

27. Section 58 provides for "Electoral colleges". So far as it is relevant, it reads thus:

"58. (1) For the purposes of holding elections under sub-section (1) of section 57, -

(a) each electoral division in the Block shall be divided into two electoral colleges [by the State Election Commission, so however, that such electoral colleges shall be divided in such manner that the ratio between the population of each electoral college and, the total number of members to be elected for the Panchayat Samiti shall, as far as practicable, be the same throughout the Panchayat Samiti area];

(1A) the list of voters for each such

electoral division referred to in sub-section (1) of section 13 and in force on such date as the [State Election Commission] may, by general or special order notify in this behalf, for such part of the electoral division as is included in an electoral college, shall be the list of voters for such electoral college. An officer designated by the [State Election Commission] shall maintain the list of voters for each electoral college."

28. These provisions indicate that the Zilla Parishad consists of councillors chosen by direct election from electoral division in the district. For the purposes of election of councillors, every district is divided into electoral divisions each returning one councillor. The electoral roll prepared for the Maharashtra Legislative Assembly and in force on such day as the State Election Commission may by general or special order notify in this behalf for such part of the constituency of the Assembly as is included in an electoral division is the voters list, for such electoral division.

29. For every Block there is a Panchayat Samiti and every Panchayat Samiti consists of members elected by direct election from each electoral college. For the purpose of holding elections of the Panchayat Samiti each electoral division is divided into two electoral colleges

and the list of voters for each such electoral college shall be the list of voters for such part of electoral division as is included in an electoral college as per the voters list prepared for Assembly elections. Electoral college has a separate list but, it is taken from the list prepared for Assembly elections. The electoral collage is not divided on the basis of voters but on the basis of population and ratio which is required to be maintained as per the Act.

30. Power to create electoral divisions and colleges is vested in the State Election Commission. Under section 9-A of the said Act, the State Election Commission can delegate its powers to any officer of the State Government not below the rank of Tahsildar. Rule 2(c-i) of the said Rules defines list of voters to mean the list of voters notified by the State Election Commission under sub-section 1 of section 13 of the said Act. Rule 9 of the said Rules provides for "Polling station". It reads thus :

> "9. Polling Stations:-
>
> The Returning Officer shall provide a sufficient number of polling stations for each [electoral college] for which election is to be held and shall, not later than seven days before the date of poll; publish a list showing [the polling station

and the areas for which they will be set-up (hereinafter referred to as the "Polling area").]

31. Therefore, under this rule, the Returning Officer has to provide sufficient number of polling stations for each electoral college for which election is to be held and not later than seven days before the date of poll he has to publish a list showing the polling stations and the areas for which they will be set up.

32. The record of the case and the evidence of PW-2 Arvind Koli, the Returning Officer disclose following facts. On 6/10/2001, instructions were received from State Election Commission about the election of Zilla Parishad and Panchayat Samiti about electoral divisions and colleges. It is at Ex.116. Each Returning Officer was to submit his proposal for formation of electoral divisions and electoral colleges. Tahsildar Patan sent his proposal dated 16/7/2001. It is at Ex.117. Objections to the said proposal were invited upto 28/11/2001. On 6/11/2001, the State Election Commission informed all the District Collectors and Revenue Commissioners to declare Zilla Parishad and Panchayat Samiti elections. The letter is at Ex.119. On 26/11/2001, the State Election Commission circulated the election programme for Panchayat Samiti election. It is at Exh.120.

33. On 22/12/2001, the District Collector, Satara, by his letter dated 22/12/2001 (Ex.118) informed that he had finalised the electoral divisions and colleges and directed that the final list be published on 24/12/2001. A final list was published under section 58 of the said Act. It was final publication in respect of division of electoral colleges and electoral divisions in Patan Panchayat Samiti block. It was a declaration stating the area, number of seats and reservations. As per this final list, village Mandrul Kole Khurd and village Mandrul Kole Budruk were shown in 28 Sanbur electoral college. This division was obviously made on the basis of population to maintain the requisite ratio so as to rule out imbalance. I have perused the final list. In fact Mandrul Kole Khurd and Mandrul Kole Budruk villages are shown in 28 Sanbur and in 27 Dhebewadi electoral collage, there is no mention of Mandrul Kole village at all. I am not impressed by Mr. Patil's submission that the schedule to Ex-118 cannot be read in evidence because it is not signed. It has a seal of Collector, Satara. This schedule can be safely relied upon. Not much can be made of the statement made by Shri Koli in his evidence that there is no village by name Mandrul Kole Bk. After this statement, Shri Koli has immediately added that there are villages by name Mandrul Kole and Mandrul Kole, Khurd.

34. This makes it clear that the electoral divisions were divided into electoral colleges and that list came

to be published on 24/12/2001. Area of electoral colleges was fixed and Mandrul Kole Khurd and Mandrul Kole Budruk were shown in 28 Sanbur and in 27 Dhebewadi division, Mandrul Kole village was not mentioned at all. Therefore, the residents of Mandrul Kole could not have voted in 27 Dhebewadi electoral college. It is also pertinent to note that the map filed along with the programme also showed Mandrul Kole village in 28 Sanbur electoral college.

35. It appears that on 23/12/2001, Grampanchayat of Mandrul Kole held a meeting. In that meeting a resolution was passed which is at Ex-126. The resolution stated that the polling centre for Mandrul Kole is at Dhebewadi primary school. This is very inconvenient to the people and, therefore, polling centre be shifted to primary school at Mandrul Kole Awadh. PW-2 Koli the Returning Officer verified the situation and realised the mistake. He realised that 14 Dhebewadi electoral division consists of 27 Dhebewadi and 28 Sanbur. Mandrul Kole village comes under 28 Sanbur. Voters of polling centre 246 Dhebewadi are of Mandrul Kole village and, therefore, 246 polling centre must be included in 28 Sanbur. PW-2 Koli accordingly sent a letter dated 29/1/2002 (Exh-95) to the Collector, Satara. On 6/2/2002 the District Collector, Satara, approved the change of polling station i.e. shifting polling centre 246 Dhebewadi to Primary School Awadh (Mandrul Kole), and passed the order. This change was effected under rule 9

of the said Rules. In my opinion, under rule 9, such a mistake could always have been rectified. Moreover, that mistake was rectified more than 7 days prior to the date of polling as per rule 9 of the said Rules. Polling was to take place on 17/2/2002. The mistake was rectified and list was published on 8/2/2002 i.e. not less than seven days before the date of poll.

36. It must be remembered that village Mandrul Kole Khurd and village Mandrul Kole Budruk were shown in electoral college 28 Sanbur in the notification issued by the State Election Commission on 22/12/2001 and final declaration dated 24/12/2001. There was no change effected in it. In fact, such a change could never have been effected by the Returning Officer. Pursuant to the resolution of the Grampanchayat dated 23/12/2002, the Returning Officer submitted a letter (Ex.95) dated 29/1/2002 to the District Collector, Satara to rectify the error by which the polling centre 246 was wrongly shown in Dhebewadi electoral college when it should have been in Sanbur electoral college. This change was effected as per rule 9 of the said Rules. The petitioner is trying to create an impression that there is tampering with the declaration. That is not correct. Moreover, there was no question of publishing any voters list on that day. It must also be remembered that voting list prepared for Assembly elections is always in the field as per section 13 of the said Act and voters list of electoral division has to be taken from it. On 8/2/2002,

mistake in allotment of polling centre and polling area was rectified under rule 9. It is also significant to note that the petitioner's witness Resident Naib Tahsildar Shri Shinde has supported the case of the respondents. In view of this, in my opinion, the allegation of the petitioner that the election is vitiated by any illegality, must fail.

37. It is significant to note that the petitioner had not raised any objection as regards formation of divisions and electoral colleges, declared by Election Officer. He has admitted that he did not file any written complaint and though he was knowing the change one day prior to the election, he did not make any inquiry with the Returning Officer. He had appointed his representative at the polling centre in Mandrul Kole Awadh primary school. He had appointed the counting agent. He made no complaint at the time of counting. In this connection, Mr. Patil contended that the petitioner could not have raised any dispute because the election process had started. On this point, he relied upon the judgment of the Supreme Court in **Boddula Krishnaiah and another v. State Election Commissioner, A.P. & Ors., AIR 1966 SC 1959** where the Supreme Court has observed that once election process has been set in motion, High Court would not be justified in interfering with it. Mr. Patil contended that the petitioner cannot be faulted for not having made any complaint. It is true that once the election process starts, the courts would not interfere

with it. But the instantaneous reaction of a candidate who is really aggrieved by any illegality in the election process would be to register a protest or make his grievance evident immediately in some discernible manner. The fact that the petitioner did not utter a whisper till the election results were declared reflects on the genuineness of his case.

38. So far as the allegation of corrupt practice is concerned, the petitioner has vaguely alleged it. There are no particulars of corrupt practice. The petitioner has failed to make out any case of malafides or corrupt practice. So far as the changes made in the Register are concerned, I do not find that they indicate any manipulation. I find substance in Mr. Kumbhakoni's submission that the said changes were made openly as a consequence of the error and in order to rectify it. It is true that respondent 1 has not stepped in the witness box. But, that in my opinion, will not have any adverse impact on the respondents' case because the petitioner himself has not been able to establish his case. Besides documents on record and the provisions of law completely non-suit the petitioner.

39. It is also pertinent to note that there is no challenge to election of 27 electoral colleges. The petitioner in Election Petition No.9 of 2002 has accepted the trial court's decision holding that election to be valid. I am of the confirmed opinion that there is no

irregularity in the election of 28 Sanbur electoral college. But assuming there is some irregularity which would vitiate that election, setting it aside would mean setting aside election of 27 electoral college. That would violate the voting rights of the said voters. Such instability and chaotic condition will have to be avoided.

40. The petitioner's grievance is that because the election officer allowed the voters of polling centre 246 to caste their votes in 28 Sanbur, the total strength of voters of 28 Sanbur increased. The petitioner has lost the election by 186 votes. According to the petitioner 593 voters caste their votes from polling centre 246. It was argued that because of the last minute change, the petitioner could not canvass in the area covered by the polling centre 246. What is suggested is that these voters might have voted against the petitioner because he could not canvass in that area and, therefore, it is prayed that the said 593 votes must be separated and recounting must be done of the remaining votes.

41. It is not possible to accept such a fanciful and imaginary argument. In **Beli Ram's case (supra)**, the Supreme Court was dealing with a case where the allegation was that there was a change of polling booth just before the date of polling. The Supreme Court

observed that sufficient publicity was given to the change of polling booth and, hence, there was no violation of section 36 of the Jammu & Kashmir Representation of People Act, 1957. The Supreme Court observed that unless the election petitioner proves that the result of the election is materially affected in so far as the returned candidate was concerned, the election cannot be set aside. The Supreme Court relied on its earlier decision in **Vashist Narain Sharma v. Dev Chandra, (1955) 1 SCR 509** where there was a difference of 111 votes between the returned candidate and the candidate who had obtained the next highest number of votes. One candidate was found not competent to stand and the question was whether the votes wasted on that candidate, if they had been polled in favour of the remaining candidates, would have materially affected the fate of the election. In dealing with this question, the Supreme Court observed "It is impossible to accept the ipse dixit of witnesses coming from one side or the other to say that all or some of the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of the fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand." The Supreme Court further observed it will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The

casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. The Supreme Court accepted that the petitioner in such a case is confronted with a difficult situation, but the Supreme Court went on to observe that it is not possible to relieve him of the duty imposed upon him. After referring to **Vashist Narain Sharma's case (supra)**, the Supreme Court reaffirmed that the burden under our law lies on the election petitioner to show affirmatively that the result of the election has been materially affected.

42. In the light of above observations of the Supreme Court, it will have to be seen whether the petitioner has shown affirmatively that the result of the election has been materially affected because of the change in the polling centre. It was incumbent upon him to discharge the the onerous burden,which was on him to prove this. He has not done so. No such evidence has been adduced to indicate that because 586 voters have voted from 28 Sanbur constituency, the result of the election in so far as the petitioner is concerned, was materially affected.

43. In view of the above, in my opinion, the petitioner has failed to prove that the Panchayat Samiti election of 28 Sanbur is vitiated by any irregularities or illegalities. He has failed to prove the allegation of

corrupt practice. The said election is legal and valid.

Hence, the petition is dismissed.

44. At this stage, Mr. Patil, the learned counsel for the petitioner states that the ad-interim order granted by this court may be continued for three months from today. In the circumstances, the ad-interim order to continue for three months from today.

(SMT. RANJANA DESAI, J.)